

SPENCER FANE

BRITT & BROWNE LLP

ATTORNEYS & COUNSELORS AT LAW

ERIC J. STEINLE
DIRECT DIAL: (816) 292-8173
estcinle@spencerfane.com

File No. 3356900-95

October 3, 2008

VIA FACSIMILE (202) 219-3923
AND FEDERAL EXPRESS

Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR # 6072 Response and Affidavit

Ladies and Gentlemen:

Please find enclosed on behalf of NPG Newspapers Inc., Respondent under MUR # 6072, a Response to Complainant's Complaint for Violation of Commission Debate Rules, and an Affidavit of Mr. Newton, an employee of Respondent. We have also enclosed a copy of the Statement of Designation of Counsel that was previously filed with respect to this matter.

Thank you for your assistance in this matter.

Very truly yours,



Eric J. Steinle

EJS/
Enclosures

1000 Walnut Street, Suite 1400
Kansas City, Missouri 64106-2140
(816) 474-8100 www.spencerfane.com Fax (816) 474-3216

WA 988928.1

Kansas City, Missouri

St. Louis, Missouri

Overland Park, Kansas

Omaha, Nebraska

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OFFICE OF GENERAL
COUNSEL

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FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

DAVID BROWNING

Oak Grove, MO 64075

Complainant,

vs.

NPG NEWSPAPERS, INC.

825 Edmond Street

St. Joseph, MO 64501

Respondent.

MUR # 6072

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**RESPONSE TO COMPLAINANT'S COMPLAINT FOR VIOLATION OF
COMMISSION DEBATE RULES**

COMES NOW the Respondent, NPG Newspapers Inc., and for its response to Complainant's Complaint for Violation of Commission Debate Rules (the "Complaint"), states as follows:

The Complaint should be dismissed and no action should be taken against Respondent because: (1) Respondent's staging of a candidate debate falls within the media exemption contained in the Federal Election Campaign Act of 1971 ("FECA"); and (2) even if Respondent's staging of a candidate debate does not fall within the media exemption, it has complied with Commission rules with respect to the staging of such debates.

1. Respondent's staging of a candidate debate falls within the media exemption contained in FECA.

The Commission lacks the authority to regulate Respondent's staging of a candidate debate because Respondent is a bona fide newspaper operating within FECA's media exemption. As recognized in prior Statements of Reasons issued by the Commission, courts have insisted the Commission utilize a two-stage process when considering complaints against media entities. *See e.g.*, MURs 4956, 4962, 4963 and 5224; *Readers Digest Ass'n, Inc. v. FEC*, 509 F. Supp. 1210, 1214 (S.D.N.Y. 1981), and *FEC v. Phillips Publishing, Inc.*, 517 F. Supp. 1308, 1312-13 (D.D.C.1981). The two-stage process requires the Commission to restrict its initial inquiry to whether the media exemption applies. *Id.* Only after concluding that the media exemption does not apply may the Commission commence an inquiry under its otherwise applicable "in connection with" (2 U.S.C. § 441b(a)) or "purpose of influencing" (2 U.S.C. § 431(8)(A), (9)(A)) standards. *Id.*

Courts generally require the Commission to utilize this two-stage process because the media exemption represents a fundamental limitation on the jurisdiction of the Commission, and investigation of publishers can trespass on the First Amendment. The United States District Court for the Southern District of New York has stated,

[F]reedom of the press is substantially eroded by investigation of the press, even if legal action is not taken following the investigation. Those concerns are particularly acute where a governmental entity is investigating the press in connection with the dissemination of political matter. These factors support the interpretation of the statutory exemption as barring even investigation of press activities which fall within the press exemption.

Readers Digest Ass'n Inc., 509 F. Supp. at 1214.

The FECA media exemption provides that the term "expenditure" does not include "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate." 2 U.S.C. § 431(9)(B)(i).¹ Courts generally will find that the FECA media exemption is applicable if two criteria are met: (a) the entity is not owned or operated by a political party, candidate or political committee, and (b) the entity is operating within its "legitimate press function." *Readers Digest Ass'n Inc.*, 509 F. Supp. at 1214; *see also Phillips Publishing, Inc.*, 517 F. Supp. at 1313. Respondent meets both of these criteria, as discussed below.

Respondent operates the St. Joseph News Press, a daily newspaper distributed in St. Joseph, Missouri, and is not owned or controlled by any candidate, political party or political committee. Therefore, Respondent is a bona fide news organization.

As recognized in prior Statements of Reasons issued by the Commission, a bona fide news organization's staging of a candidate debate is a "news story" within the meaning of § 431(9)(B). *See* MURs 4956, 4962, 4963 and 5224. Courts indicate that the content of the broadcast is irrelevant to the determination of whether the media entity is exercising its valid press function. *Readers Digest Ass'n, Inc.*, 509 F. Supp. at 1216. In addition, the statutory language of the FECA media exemption is categorical, precluding the Commission from creating requirements which a debate must meet in order to qualify for such exemption. *See* MUR 5224. Further, concluding that Respondent meets the media exemption is consistent with prior Statements of Reasons issued by the Commission and court opinions. *See* MURs 4956, 4962, 4963, 5224 and *Readers Digest Ass'n, Inc.*, 509 F. Supp. at 1216. Therefore, Respondent's staging of a candidate debate is not subject to Commission regulation under the FECA media exemption contained in § 431 (9)(B).

¹ Commission regulations also provide that each of the terms "contribution" and "expenditure" do not include "[a]ny cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer), Web site, newspaper, magazine, or other periodical publication, including any Internet or electronic publication . . . unless the facility is owned or controlled by any political party, political committee, or candidate . . ." *See* 11 CFR §§ 100.73, 100.132.

2. Even if Respondent's staging of a candidate debate does not fall within the media exemption, it has complied with Commission rules with respect to the staging of such debates.

Respondent is staging a debate on October 16, 2008 (the "Debate") among candidates for the U.S. 6th Congressional District (the "District"), which will include at least two such candidates. Respondent did not exclude Complainant, a Libertarian candidate in the District race, from the Debate in order to promote or advance some candidates over another in violation of 11 CFR § 110.13(b). Rather, Respondent has limited participation in the Debate to politically viable candidates due to the format and time constraints with respect to the Debate.

Respondent selected the politically viable candidates to participate in the Debate based solely on pre-established, objective criteria in accordance with 11 CFR § 110.13(c). Ken Newton ("Mr. Newton"), an employee of Respondent, was responsible for selecting the viable candidates. See Affidavit of Mr. Newton ¶ 4, attached hereto as Exhibit A. Mr. Newton selected the candidates based on pre-established, objective criteria, including an examination of each candidate's financial support, popular support, historical data and expenditures of time, money and effort. See Affidavit of Mr. Newton ¶ 5. Mr. Newton based this examination on objective measures such as Commission filings, independent polling results and data from prior elections. See Affidavit of Mr. Newton ¶¶ 7-10.

Mr. Newton determined that Complainant failed to meet any of the pre-established, objective criteria. See *id.* Since Complainant failed to meet these criteria, he was not considered a viable candidate and was not selected to participate in the Debate. Therefore, Respondent has complied with Commission rules 11 CFR §§ 110.13(b) and (c) in staging the Debate.

As an additional matter, Respondent has attempted to provide Complainant with an adequate forum and an opportunity to publicize his campaign. On June 6, 2008 and September 15, 2008, Respondent printed stories focusing on Complainant, which appeared on the front page of Respondent's newspaper. Such acts show a good-faith effort to provide Complainant's views to the public.

WHEREFORE, for the reasons set forth above, Respondent hereby requests that the Complaint be dismissed and that no action be taken against Respondent.

Respectfully Submitted,

SPENCER FANE BRITT & BROWNE LLP



Michael L. McCann, Esq.
Eric J. Steinle, Esq.